[redacted]

OCTOBER TERM, 1906.

No. 74.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. THE METROPOLITAN STREET RAILWAY COMPANY,

Plaintiff in Error,

against

THE STATE BOARD OF TAX COMMISSIONERS,

Defendants in Error.

In Error to the Supreme Court of the State of New York.

POINTS FOR DEFENDANTS IN ERROR.

JULIUS M. MAYER,
Attorney General of the State of New York.

LOUIS MARSHALL,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 74.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE METROPOLITAN STREET RAILWAY COMPANY,
Plaintiff in Error,

against

THE STATE BOARD OF TAX COMMISSIONERS,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Points for Defendants in Error.

This cause was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of *certiorari* might be allowed, directed to the defendants in error, for the purpose of reviewing an assessment to the amount of $12,313,200.37, that being the valuation placed on

the special franchise belonging to the relator, such assessment having been made under the provisions of Chapter 712 of the Laws of 1899, which is known as the Special Franchise Tax Law (Rec., pp. 3-8).

The questions involved in this cause are substantially identical with those which have been considered in the Points submitted herewith in the case of *The People of the State of New York ex rel. The Brooklyn City Railroad Company v. The State Board of Tax Commissioners,* and which is No. 79 on the present docket. It is therefore deemed desirable to avoid repetition, and in consequence, the argument presented in that case will be treated as having been repeated in the present case.

The differences between those two cases, which will be briefly adverted to, are indicated by the terms of the franchises of the relator, on which the assessment which is the subject of attack in this proceeding has been based.

The issues herein were referred to Hon. Robert Earl, and were tried in conjunction with those arising in the Brooklyn City Railroad Company case. Independent findings of fact and of law were made by the referee. They appear at Record pages 424-438.

The opinions rendered in this cause by the referee, the Appellate Division of the Third Department of the Supreme Court and the Court of Appeals are identically the same as those which were delivered in the Brooklyn City Railroad Company case. They appear at Record pages 438-474; 536-559; 571-593.

The Referee's Findings as to Relator's Franchise.

Findings 2 to 21 are as follows:

2. That the Metropolitan Street Railway Company is a corporation created by the consolidation of seven railroad corporations, namely, the Houston, West Street & Pavonia Ferry Railroad Company, the Broadway Railway Company, the South Ferry Railroad Company, the Metropolitan Crosstown Railway Company, the Lexington Avenue and Pavonia Ferry Railroad Company, the Columbus and Ninth Avenue Railroad Company and the Chambers Street and Grand Street Ferry Railroad Company.

3. That a succinct history of the consolidation of the above named corporations into the Metropolitan Street Railway Company is set forth in the statement upon this subject contained in the testimony, which statement is hereby found correct and made a part of this finding.

4. That the Broadway Railway Company, one of the corporations which consolidated as aforesaid, owned, at the date of said consolidation, the right and privilege to construct and perpetually to maintain and operate a street surface railway on certain streets and public places named in a resolution adopted December 5, 1884, pursuant to Chapter 252 of the Laws of 1884, by the common council of the City of New York, by which resolution, upon the terms and conditions therein named, the grant of the said right and privilege to the Broadway Surface Railroad Company was consented to. A copy of said resolution is annexed to the relator's report to the said State Board, and is hereby made a part of this finding.

On or about May 14, 1886, the said Broadway Surface Railroad Company was dissolved by the Legislature by Chapter 268 of the Laws of 1886, and, upon such dissolution, all its property, franchises, powers, privileges, exemptions and immunities, including its specal franchises, became vested in its directors as trustees for the benefit of its creditors and stockholders. Thereafter, and on or about September 11, 1889, the said directors, as trustees aforesaid, duly conveyed all the rights, powers, privileges and franchises which the said The Broadway Surface Railroad Company had or owned at the time of its dissolution, including the rights consented to by said resolution, to Daniel S. Lamont, who thereafter, and on or about April 8, 1891, duly conveyed the same to the said The Broadway Railway Company.

5. That on January 8, 1900, the Metropolitan Street Railway Company was also the lessee of street railroad franchises which were owned by the following railroad corporations:

Bleecker Street and Fulton Ferry Railroad Co.

Broadway and 7th Avenue Railroad Co.

Central Park, North and East River Railroad Co.

Eighth Avenue Railroad Co.

Forty-second St. & Grand St. Ferry R. R. Co.

New York and Harlem Railroad Co. (city line).

Ninth Avenue Railroad Co.

Second Avenue Railroad Co.

Sixth Avenue Railroad Co.

Twenty-third Street Railroad Co.

6. That each of the aforementioned corporations, which consolidated as aforesaid, at the date of such consolidation, owned at least one separately granted right and privilege to construct, maintain and operate a street surface railroad upon certain streets, avenues and public places in the Borough of Manhattan, City of New York, and some of them owned more than one such separately granted right and privilege; and upon the streets and avenues where each of such corporations owned such right and privilege or rights and privileges, each had constructed a street surface railroad, and at the date of the consolidation aforesaid was engaged in the operation of such street surface railroads in the said Borough of Manhattan.

7. That the several streets, avenues and public places on which the above named corporations which consolidated as aforesaid had constructed and were engaged in operating street surface railroads, are set forth and enumerated in Exhibit 63.

8. That a map of the Borough of Manhattan in the City of New York was put in evidence by the relator as Exhibit 63, upon which are correctly delineated the several street railroad franchises owned by the corporations which consolidated into the Metropolitan Street Railway Company, which street railroad franchises, were on the second Monday, that is the 8th day of January, 1900, owned by the Metropolitan Street Railway Company, and which map is hereby found to be correct and to contain a correct delineation of said franchises and is made a part of this finding.

9. That on January 8, 1900, the special franchise

owned by the relator embraced eighteen separately granted rights or privileges.

10. That each of said rights and privileges had been separately granted on certain conditions and subject to the performance by the grantee thereof of certain terms, which conditions and terms appear in the schedules and charters annexed to the return herein and are hereby made a part of this finding.

11. That by the terms of the various grants to the consolidating companies under which the relator company now holds and enjoys the eighteen street railroad franchises hereinbefore referred to, it is obligated to pay to the city of New York annually sums as follows:

(*a.*) By resolution of the common council of December 5, 1884, consent was given that a franchise be granted to the Broadway Surface Railroad Co., the predecessor in title of the Broadway Railway Company, providing that such company shall for and during the first five years after the commencement of operation of any portion of its road constructed, pay to the city of New York three per cent. of its gross receipts annually, and five per cent. of its gross receipts thereafter, and also in addition thereto the sum of $40,000 per year after the first year; and also if any other railroad company should use the tracks of said Broadway Surface Railroad Co., such company should pay to the city three per cent. of its gross receipts for the first five years, and five per cent. of its gross receipts thereafter; such special franchise being marked No. 1 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*b.*) By Chapter 508 of the Laws of 1874, incorporating the South Ferry Railroad Co., the company was required to pay one per cent. of its gross receipts to the city.

By chapter 393 of the Laws of 1875, amending the foregoing act, the company was required to pay two per cent. of its gross receipts to the city, such special franchise being marked No. 2 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*c.*) By resolution of the common council of the city of New York, adopted December 30, 1884, consenting to the grant to the Chambers Street & Grand Street Ferry Railroad Co. of the right to run along Roosevelt and other streets, it was provided that the company should comply with the provisions of Chapter 252 of the Laws of 1884, which required the payment of three per cent. of its gross receipts annually for five years, and five per cent. annually thereafter; such special franchises being marked No. 3 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*d.*) By Chapter 625 of the Laws of 1868, incorporating the Avenue C Railroad Company, the predecessor in title of the Houston, West Street & Pavonia Ferry Railroad Co., it was provided that the company should pay to the sinking fund commissioners of the city of New York the sum of one thousand dollars annually besides the license fee then paid by other city railroads; such special franchise being marked No. 4 upon the map heretofore made a part of these findings, and introduced in evidence as "Metropolitan Exhibit No. 63."

(*e.*) For the franchise to extend its tracks in Avenue C through 17th, 18th and other streets in the city of New York, acquired under chapter 19 of the Laws of 1871, the Avenue C Railroad Company was required to pay compensation as fixed by commissioners; such special franchise being marked No. 5 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*f.*) By resolution of the common council of the city of New York, adopted September 29, 1892, granting consent to the Houston, West Street & Pavonia Ferry Railroad Co. to operate along Ridge and Montgomery Streets, the company was required to pay to the city for the first five years after the commencement of operation three per cent. of its gross receipts and five per cent. thereafter; such special franchise being marked No. 6 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*g.*) By resolution of the common council of the city of New York, adopted September 29, 1892, granting consent to the Houston, West Street & Pavonia Ferry Railroad Co. to operate along Pitt and Gouverneur and other streets, it was provided that the company should for the first five years after commencement of operation of such extension pay to the city three per cent. of its gross receipts and five per cent. thereafter; such special franchise being marked No. 7 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*h.*) By resolution of the common council of the

city of New York, adopted September 29, 1892, granting consent to the Houston, West Street and Pavonia Ferry Railroad Company to operate on Lexington Avenue between Twenty-seventh and Thirty-sixth street, it was provided that the company should pay to the city for the first five years after commencement of operation of such extension three per cent. of its gross receipts and five per cent. of its gross receipts after the first five years; such special franchise being marked No. 8 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit 63.'

(*i.*) For the franchise to operate its tracks through East and other streets in the city of New York, acquired under resolution of the common council of the city of New York, approved December 31, 1889, which resolution provided that the franchise should be sold at auction to the bidder which would give the highest percentage of its gross receipts, the Metropolitan Crosstown Railroad Company agreed to pay to the city six per cent. of its gross receipts up to the year 1896, and eight per cent. thereafter; such special franchise being marked No. 9 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*j.*) By resolution of the common council of the city of New York, adopted September 28, 1892, granting consent to the Metropolitan Crosstown Railroad Company to operate through West Third and other streets in the city of New York, it was provided that the company should pay to the city the annual percentages provided for extensions or branches (referring to sec. 95 of the railroad law,

which required three per cent. of the gross receipts to be paid annually for five years and five per cent. annually thereafter); such special franchise being marked No. 10 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*k.*) By resolution of the common council, adopted September 29, 1892, granted to the Metropolitan Crosstown Railroad Co. consent to extend through South Fifth avenue and other streets, said company was required to pay to the city the annual percentages required to be paid for extensions and branches (referring to sec. 95 of the railroad law above referred to); such special franchise being marked No. 1 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*l.*) By resolution of the common council, adopted September 29, 1892, granting to the Metropolitan Crosstown Railroad Co. consent to extend through West Broadway, Canal and other streets in said city, the company was required to pay to the city the annual percentages required for extensions and branches (referring to sec. 95 of the railroad law above referred to); such special franchise being marked No. 12 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*m.*) By resolution of the common council of the city of New York, adopted September 29, 1892, the right to operate a street surface railroad on Lexington avenue north of 42d street and on 116th street between Morningside park and the East

river, was sold at public auction and was purchased by the Lexington Avenue & Pavonia Ferry Railway Company on its agreeing to pay to the city 3½ per cent. of its gross receipts for the first five years after the commencement of operation, and 5½ per cent. of its gross receipts thereafter, such special franchise being marked No. 13 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*n.*) By resolution of the common council of the city of New York, adopted October 10, 1892, the franchise to operate along Columbus Avenue from 64th to 109th street and other streets, was sold at auction to the Columbus & Ninth Avenue Railroad Co. upon its agreement to pay therefor 3¼ per cent. of its gross receipts for the first six years after the commencement of operation, and 5¼ per cent. of its gross receipts thereafter; such special franchise being marked No. 14 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*p.*) By resolution of the common council of the city of New York, adopted April 14, 1896, granting to the Metropolitan Street Railway Company consent to extend and operate its railroad along West Broadway and other streets, the company was required to pay into the treasury of the city of New York annually the percentages provided for extensions and branches in section 95 of the railroad law, i.e., three per cent. of the gross receipts annually for five years and five per cent. annually thereafter; such special franchise being marked No. 16 upon the map heretofore made a

part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*q.*) By resolution of the common council of the city of New York, approved January 8, 1894, the right to construct and operate a street surface railroad upon West 125th Street, Boulevard and other streets in said city, was sold at public auction on June 18, 1895, and purchased by the Metropolitan Street Railway Company on its agreeing to pay the city three and one-tenth per cent. of its gross receipts for the first five years and five and one-tenth per cent. thereof thereafter; such special franchise being marked No. 17 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

(*o.* and *r.*) By resolution of the common council of the city of New York, adopted September 18, 1894, consent to operate through 109th street and Manhattan avenue was granted to the Columbus & Ninth Avenue Railroad Co. upon its paying to the city the percentages provided for extensions or branches in section 95 of the railroad law and upon its complying with the provisons of article IV. of the railroad law. Pursuant to these provisions, the franchise was sold at auction to the said company as the highest bidder, the company agreeing to pay for the first five years after the commencement of operation 3¼ per cent. of its gross receipts annually, and 5¼ per cent. annually thereafter; such special franchise being marked Nos. 15 and 18 upon the map heretofore made a part of these findings and introduced in evidence as "Metropolitan Exhibit No. 63."

12. That prior to the consolidation of the cor-

porations which formerly owned the several franchises now owned by the relator, they were severally encumbered by mortgages to secure the payment of the bonds of the corporations then owning the franchises; all of which bonds, as hereinafter stated, had prior to the date of said consolidation been issued by such corporations, and were outstanding and unpaid at the date of the consolidation. The following is a correct list of such mortgages, giving the name of the mortgagor, the date and amount of each mortgage:

Mortgagor.	Date.	Amount.
Broadway Surface Railroad Co	July 1, 1884,	$1,500,000
Broadway Surface Railroad Co	June 1, 1885,	1,000,000
Metropolitan Crosstown R'y Co	Apr. 1, 1890,	600,000
Metropolitan Crosstown R'y Co	May 1, 1890,	300,000
Lexington Ave. & Pavonia F'y R'y Co	Aug. 24, 1893,	5,000,000
Columbus & 9th Ave. R. R. Co	Aug. 24, 1893,	3,000,000
South Ferry R. R. Co	April 1, 1899,	350,000

13. That all of the franchises owned and leased by the relator were on January 8, 1900, operated by the relator under and as one system, a portion thereof by cable power, a portion by underground electricity, and some part thereof by horse power. Continuous routes of travel had been established by the relator by operating several franchises as a single line without regard to whether such franchises were owned or leased by the relator.

14. That prior to January 8, 1900, the relator had executed and delivered to the Guarantee Trust Company of New York, as trustee, a mortgage to secure the payment of its bonds, amounting to the sum of $12,500,000, which mortgage conveyed to said trustee all street railroad franchises, rail-

ways, railroad routes and the real estate owned by the relator, which it had acquired by the consolidation aforesaid, as well as other real estate and personal property and all the leases which the relator held of other street railroad franchises, railroads and railroad routes owned by other companies. The personal property included in said mortgage consisted of stocks and bonds amounting in value to $14,000,000 or thereabouts. All of the bonds secured by such mortgage, amounting to $12,500,000, had, prior to January 8, 1900, been issued and were outstanding and unpaid at that date.

15. That the relator at an actual cost of $6,000,000 for new construction and equipment by which $6,000,000 cost of structure and equipment was superseded and became worthless, has substituted electrical operation for that of cable on some of its lines.

16. That a map of the Borough of Manhattan, put in evidence by the relator as Exhibit 60, correctly delineates the franchises owned by the corporation comprising the system as they existed on January 8, 1900.

17. That by virtue of the statutes, consents and ordinances constituting the eighteen street railroad franchise grants of the relator company, copies of which consents and ordinances are annexed to the return herein, and are hereby made a part of these findings, there was granted to and became vested in the relator company, or its predecessors in title, rights to perpetually maintain, operate and use a street surface railroad for public use in the conveyance of the persons and property in cars upon and along the surface

of the streets, avenues and highways in the city of New York, described in such grants, and all such rights are now vested in the relator.

18. That by virtue of the same instruments and the general statutes of the State, there was granted to and became vested in the relator, and its predecessors in title, the franchises to construct, maintain, operate and use the street railroads as above described, which franchises are property and constitute interests in perpetuity in the streets.

19. That all the street railroad franchises owned by the relator which were acquired subsequent to July 1, 1886, have been acquired under and in pursuance of chapter 65 of the Laws of 1886 as amended, or under the railroad law, section 93 of which substantially embodies said chapter.

20. That the amount charged against the Metropolitan Street Railway Company and its leased roads (the Third Avenue system not then being leased to the relator), for taxes of all kinds and license fees for the year ending the second Monday of January, 1900, all of which were actually paid by the relator, except the sum of $218,514.64 so assessed and in suit, were as follows:

Real estate (charter of New York City, sec. 889)	$197,074.21
Personal (charter of New York City, sec. 894)	6,022.28
Car license (various franchise grants)	44,850.00
City, per cent. tax on earnings (secs. 93 and 95 R. R. law)	255,188.82
R. R. Commissioners (sec. 170 R. R. law)	6,362.01

State tax on earnings (sec. 182 tax law)	149,247.32
Dividend tax (sec. 185 tax law)	78,729.72
	$737,474.36
Personal (in suit)	218,514.64
Total	$955,989.00

21. That the relator has filed with the State Board of Tax Commissioners all reports required by law or required to be filed by said commissioners. Copies of such reports are in evidence, and reference is made thereto for their contents.

THE SEVERAL STATUTES UNDER WHICH RELATOR'S FRANCHISES WERE CREATED.

(*a*) Appendices A B, C, D and E hereto annexed, contain the provisions of *Chapter* 252 *of the Laws of* 1884, *Chapter* 65 *of the Laws of* 1886, *Chapter* 642 *of the Laws of* 1886, and *Sections* 93 *and* 95 *of the New York Railroad Law,* which are referred to in these findings, and pursuant to which the relator has paid to the City of New York, by way of compensation for the special franchises acquired, certain percentages of the gross receipts derived from the use of such franchises.

It was under the first of these statutes that the Broadway Railroad Company, whose franchise was involved in *People v. O'Brien,* 111 N. Y., 1 acquired that franchise.

In addition to these statutes, there appear (Rec. pp. 60-108) various acts of the Legisla-

ture of New York, and a number of ordinances adopted by the common council of the City of New York, empowering the various railroads which became consolidated with the Broadway Railway Company and other corporations as a new corporation known as the Metropolitan Street Railway Company, to operate on designated streets in the City of New York.

(*b*) Of these, the charter of the South Ferry Railway Company (Chapter 508 of the Laws of 1874), after directing the manner in which the railway should be constructed, the rates of fare to be charged, **provides:**

The said persons (the corporators) or their assigns, shall annually, on the first day of November, pay into the treasury of the City of New York one per cent. of the gross receipts of the road herein provided for, the amount of which gross receipts shall be determined by the sworn statement of the President and Treasurer of said railway, but subject to the inspection of its books by the Comptroller of the City of New York." (Rec. pp. 60, 61).

By Section 5, the Legislature was empowered, at any time, to alter, amend or repeal the act.

(*c*) By amendment of this charter (Chapter 393 of the Laws of 1875) the amount required to be paid into the treasury was increased to two per cent. of the gross receipts (Rec. pp. 62, 63).

(*d*) The act authorizing the construction of a road in Avenue C and other streets (Chapter 625 of the Laws of 1868), in addition to the usual provisions, including the reservation of the power to grant, modify or repeal the charter, provided that

the company to be organized should be subject "to the payment to the city of the same license fee annually for each car run thereon as now paid by other city railroads in said city; and the said persons or their assigns are hereby authorized to charge the same rate of fare for the conveyance of passengers on said railroad as is now charged by other city railroads in said city; and the said persons or their assigns shall pay to the sinking fund commissioners of the City of New York the sum of one thousand dollars per annum, to be applied by them *in the same manner as moneys received on account of rentals and leases.*"

(*e*) By Chapter 19 of the Laws of 1871, the Avenue C Railroad Company was authorized to extend its tracks, with the usual provisions.

By Section 4 it was provided:

"The Avenue C Railroad Company *shall make compensation* to the Mayor, Aldermen and Commonalty of the City of New York *for the value of the rights and privileges herein granted or authorized, which compensation shall be ascertained or determined in the manner as far as practicable provided for fixing compensation for railroad rights and privileges by the aforesaid general railroad act* (Chapter 140 of the Laws of 1850); that is to say, if said additional tracks or extensions shall be put in practical operation or said rights and privileges be made available, the said company shall apply to the Supreme Court for the appointment of three commissioners to appraise and determine the amount of *compensation which shall be paid annually, or in a gross sum, to the Mayor, Aldermen and Commonalty as such compensation for the rights and privileges herein granted.* Such application shall be made on not less than ten days notice to the said Mayor, Aldermen and Com-

monalty of the time, place and object thereof. The decision of the said commissioners so appointed, or a majority of them, as to the amount of such compensation, shall be final and conclusive as to the said company, and the said Mayor, Aldermen and Commonalty of said city; the amount so fixed and determined shall be paid to the commissioners of the sinking fund of said city by said company within thirty days after the same becomes payable according to the decision aforesaid, and applied to the reduction of the debt of said city."

The resolutions of the common council of the City of New York, appearing at Record pages 68-108, were all governed by the provisions of the several statutes set forth in the annexed appendices.

ARGUMENT.

I.

It is submitted that no contract was created by these several statutes and ordinances, which precluded the State from imposing a tax on the special franchises of the relator.

The Federal questions arising under Chapter 712 of the Laws of 1899 having been discussed in the State Courts, in the *Brooklyn City Railroad Company case,* we have made our main argument on those questions in that case, and, in order to avoid repetition and prolixity, we will consider

that argument as made in all of the several cases which are now undergoing investigation, since it is equally applicable to all of them.

Confining ourselves, therefore, to the special features of this case which have just been detailed, we assert that it clearly appears from these several statutes and resolutions, that nothing was more remote from the intention of the Legislature and of the municipality, than to confer immunity from taxation on the grantees of the several franchises upon which the relator has been assessed with respect to the property and property rights granted.

The payments which were required of the grantees were not in the nature of taxation, in any sense of the word. They were compensation for the rights conferred, and nothing more. In some of the statutes, the payment is referred to as in the nature of the payment of a rental; in others as "compensation," and while the acts appearing as appendices, under which a large number of the franchises are derived, do not denominate the annual payments required to be made, it is evident that the payment is required as a consideration for the franchise acquired through the action of the local authorities, or purchased at public auction by the successful bidder.*

By Chapter 625 of the Laws of 1868, it was provided that the company to be organized should pay $1,000 per annum to the sinking fund commissioners of the City of New York, to be applied "in the same manner as moneys received on account of rentals and leases."

By Chapter 19 of the Laws of 1871, the Avenue C Railroad Company was required to "make com-

* Mulka v. Mayor &c. of New York, 11 Johns. 80
Bennett v. Orphan Asylum, 84 N.Y. 112
Lorillard v. Town of Stockton, 28 Barb. 662
Lorillard v. Board of Supervisors, 7 Hill, 80
St. Francis v. N.Y. Ins. Co., 148 U.S. 92

pensation for the value of the rights and privileges herein granted or authorized."

By Chapter 508 of the Laws of 1874, the incorporators were required annually "to pay into the treasury of the City of New York one per cent. of the gross receipts of the road."

By Chapter 252 of the Laws of 1884, before any franchise could be granted, it was required that an application should be made to the local authorities of the city or village in which the railroad was to be constructed, who might make provision "for the sale of and sell at public auction the franchise, subject to all of the provisions of the act, to so construct, maintain or operate said street surface railway," and by Section 8 it was provided that every corporation so constructing or operating a railway in cities having a population of two hundred and fifty thousand or more, was annually "to pay into the treasury of said respective cities in which its road was located, to the credit of the sinking fund thereof", a certain percentage of its gross receipts, and if an extension of the existing line of railroad was authorized, such percentage was to be paid "only upon such portion of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension and branches shall bear to the entire length of its tracks."

This clearly indicated that the percentage of receipts required to be paid was a measure of compensation for the right granted.

Chapter 65 of the Laws of 1886, by its very title, indicated that the purpose of the legislation was "to secure adequate compensation for the right to construct, maintain, use, operate or extend street railroads in cities or villages." By its

terms, such right, franchise and privilege was to be sold at public auction to the bidder who would give the largest percentage per annum of the gross receipts derived from the operation of said railroad.

Chapter 642 of the Laws of 1886 was an amendment of the act last referred to, and also indicates in its title, the purpose of securing "adequate compensation" for the franchise conferred.

Throughout the act the idea is emphasized, that compensation for the privilege conferred is sought to be secured to the municipality within whose boundaries the railroad is to be constructed and operated, and whose streets and avenues are devoted to the purpose of the railway.

The act further indicates that the percentage of gross earnings to be paid, is treated in the nature of a rental, and the remedy for the non-payment of such rental, prescribed by the statute, is the same remedy which is ordinarily conferred upon a lessor as against a tenant in default—the forfeiture of the demised premises.

The Railroad Law of 1890, as amended in 1892, indicates the same purpose as the acts just considered, which are codified in that act.

It thus appears upon the very face of these statutes, that the payments which the relator and its predecessors were required to make, were compensatory, by way of consideration for the grant of a fee, or the the rental of a leasehold, and not by way of commutation, for taxes. There is not a syllable in either of these acts which declares entire or partial immunity from taxation.

Exemption from taxation is not referred to in a single one of these numerous statutes. In every one of them the idea is suggested, that the privi-

leges granted are deemed things of value, and that in consequence the municipality was to be entitled to some compensation for the thing granted. In other words, railroad franchises were placed on the same footing as ferry franchises and wharfage rights, which had for many years been leased by the City of New York to individuals and corporations, and from which it had derived an annual revenue by way of rental and which were nevertheless taxed as property.

It is, however, argued, that these several statutes do not provide for compensation for the thing granted, but constitute the imposition of a tax, limited to a specified proportion of the gross receipts of the relator, and that by necessary implication the State is precluded from imposing any tax in addition to that thus specified, even upon the property which was acquired under the grant.

The case of *Heerwagen* v. *Crosstown Street Railway Co.*, 179 N. Y., 99, is relied upon as authority for the first of these premises.

That case arose under Chapter 712 of the Laws of 1899. The Comptroller of the City of Buffalo sued the defendant to recover the amount of a special franchise tax as assessed by the State Board of Tax Commissioners under the statute. The defendant sought to deduct from such tax the amount paid by it to the city during the previous year, such right of deduction being based upon the provisions of Section 46 of the Tax Law. It appeared that the franchise of the defendant had been acquired under Chapter 252 of the Laws of 1884; that a subsequent agreement, known as the Milburn Agreement, which was ratified by the Legislature, provided for a reduction of the percentage of gross earnings which the defendant was to pay, in consideration of an agreement on the

part of the defendant to give transfers to passengers conveyed by it, over other lines of railway. The plaintiff contended, that the amount so paid was not a payment "in the nature of a tax" within the meaning of Section 46.

It was held, that in view of the history of the legislation, and the fact that there was no other payment made by a railway company, which could have been in contemplation by the Legislature, the percentages so paid came within the purview of the legislation, and that the defendant was entitled to the deduction.

But the opinion of the Court clearly indicates, that it was not intended to hold that the payments so deducted, constituted a tax in fact. On the contrary, it was expressly decided, that they did not, but that the payments constituted the consideration of the grant of valuable property rights, and that only.

This is made clear beyond peradventure, by the opinion of Judge Cullen, who says:

"It may be admitted that neither the payment obligated to be made by the defendant *upon the original purchase of the franchise*, nor that substituted for it by the 'Milburn agreement,' is in the strict and accurate sense of the term a tax. A tax has been defined as a forced contribution from a citizen to the State to be applied for governmental purposes. (Davies System of Taxation, p. 1). The payments the defendant agreed to make were the consideration of the acquisition of valuable property rights which would survive its corporate existence and possess all the ordinary attributes of property. (People *v.* O'Brien, 111 N. Y., 1.) This is equally true whether the amount of the payments was prescribed by statute or fixed by competition at a public sale. The first case is in effect

simply that of a private sale where the purchaser accepts the terms fixed by the vendor. The stipulated payments are really in the nature of rent or a rent charge. But granting all this it seems to us manifest from the plain terms of the statute that these are the very payments which the legislature intended should be deducted from the amount of the special franchise tax. In the first place both in the statutes and in judicial decisions the term 'tax' is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the State or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the state is at liberty to grant or to withhold at pleasure. Instances of this kind occur in the Tax Law, and it may be that in the section before u the Legislature used the term 'In the nature o tax' in this broad, comprehensive sense. * * * We may assume that unless our Constitution prohibits it the State may contract with a corporation or taxpayer as to the amount of taxes it should pay, whether proportioned to its gross earnings or on any other basis and such a contract would be protected by the Constitution of the United States. But the Legislature of this State has not seen fit to enter into contracts of that character (except possibly at some very remote period in the charters of corporations which do not now occur to us) and certainly it has never authorized the municipalities to enter into any agreement as to taxation with corporations using the public streets and subject to the special franchise tax."

The main premise of the relator's contention being thus fallacious, it would seem to be unneces-

sary to further pursue the reasoning based upon it, but it may be useful to more closely examine the relator's argument.

Assuming that the payments reserved by this legislation in connection with the granting of franchises, constituted a tax in the strict sense of the word, it is claimed that the courts will imply from that fact, a contract between the State and the relator that no tax in addition to that specified in the legislation shall ever be imposed upon the corporation. In other words, that beyond the tax imposed by the act of incorporation, the State has impliedly remitted all further obligation to pay taxes.

This must be the logical conclusion of the relator's statement. This would relieve a corporation, not only from the payment of a tax upon its franchise as property, but from every other species of tax upon any of its property. If the principle of inclusion and exclusion on which relator's argument is predicated, is sound, then the State, by requiring the payment of a certain percentage of the gross receipts of a railway corporation, has contracted that no other tax of any kind shall be imposed upon such a corporation.

Such a claim has never been asserted by any corporation, during the many years that this legislation has stood upon the statute books of New York. The practical interpretation which has been given to the statutes, and which has been recognized by the corporations, has been that the provisions on which the relator now relies, have not precluded the State from imposing the different varieties of taxation which are set forth in the 20th finding of the referee, viz., a tax upon real estate, upon personal property, the license fee required in various franchise grants upon cars, the tax payable to defray the

expenses of the railroad commission, the State tax on earnings, and the dividend tax.

The right to impose these various forms of taxation cumulatively, has been recognized in numerous cases, including *Farrington* v. *Tennessee, 95 U. S., 686*, on which the relator relies.

Hence the plaintiff in error is forced to concede for the purposes of these cases, "that they are subject to all the forms of taxation above enumerated, whether on property, franchise to be a corporation, occupation, capital stock, earnings, dividends, or other objects, and that the local or special franchises involved in the present controversy constitute property subject to taxation, but they contend that they have entered into valid contracts definitely fixing the amount of taxes to be paid on their special franchises, and that neither the State nor the City may increase these taxes without impairing the obligation of contracts."

It is difficult to understand why, if there was any implied contract, it was thus limited, and why, if the subject of taxation was within the intention of the Legislature, the general subject was not involved, rather than taxation on the special franchises. The former involved practical considerations of great moment. The payment of general taxes on real and personal property, taxation on capital stock, on earnings and dividends, was provided for by existing statutes. Taxation on special franchises however, was unknown in the law of New York, nor was it contemplated by the Legislature. The Court of Appeals had decided that such franchises did not come within the purview of any act of the Legislature and that a franchise was neither real nor personal property, and could not be taxed.

It was not until 1899, long after the various franchises of the relator had been acquired, that the

subject of a special franchise tax was mooted or considered, and it had its origin in the messages communicated by Governer Roosevelt to the Legislature. The argument of the relator must, therefore, be in effect, this:

The State of New York, at the time of the passage of the several statutes under which the relator's franchises are derived, did not contemplate the taxation of such franchises. It had for many years acquiesced in the adjudications of its courts, that they were not taxable. It recogaized, however, that these franchises were valuable, that the municipalities out of whose streets and avenues they were to be carved were entitled to compensation for the grant of such franchises, and that notwithstanding these facts, it was the intention of the Legislature, by making provision for such payment that the grantee of the franchise should never be called upon to pay any taxes whatever on the property acquired under and by reason of the grant. In other words, it must be claimed that the State intended to confer exemption from the payment of a tax for all time to come, on a species of property as to which, at the time of the passage of the act, it could not possibly have had any intentions whatsoever.

If there was any implied contract, the minds of both contracting parties must have met upon all the terms of the contract. It will not suffice to say that the relator intended a certain thing, and that the State intended something else. Both must have intended and contracted for the identical thing.

To say, under the circumstances, that the State intended to exempt the relator from the payment of a special franchise tax, savors of the grotesque.

That there was no such intention, and that the payments required to be made by the State were merely by way of compensation for the right conferred, becomes apparent when the history of Chapter 252 of the Laws of 1884 is considered.

Prior to 1874 there was no general law in the State of New York for the granting of railroad franchises for street surface railways. It was held by the Court of Appeals in *Davis* v. *The Mayor, 14 N. Y., 506; People* v. *Kerr, 27 N. Y., 188,* and *Milhau v. Sharp, 27 N. Y., 611,* that the municipalities could not, without legislative authority, grant such franchises.

In 1874 the State Constitution was amended by providing, Article III, Section 18, that the Legislature shall be precluded from passing a private or local bill "granting to any corporation, association or individual the right to lay down railroad tracks." The Legislature was required to pass general laws providing for such a case, with the proviso "that no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property fronting on, *and the consent also of the local authorities having the control of,* that portion of the street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the General Term of the Supreme Court in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may

be taken in lieu of the consent of the property owners."

For ten years various street railway interests, under the leadership of the notorious Jacob Sharp, applied to the Legislature for the enactment of a general law authorizing the construction of street railways. In the course of this agitation those interested in the municipalities claimed that the franchises conferred were of great value, and that the municipalities were entitled to compensation, in the nature of a rental, for the rights conferred.

This agitation finally culminated in the passage of Chapter 252 of the Laws of 1884, followed immediately thereafter by the grant of the Broadway Railroad franchise, which led to a scandal which shocked the entire State and resulted in the conviction of Sharp and a number of the prominent members of the Board of Aldermen for bribery, and in sending a quorum of the Board into exile.

It is clear, therefore, that this legislation was not sought by the State, or by the municipalities. It was the result of the pertinacious, persevering and unremitting lobbying of those interested in securing railroad franchises. It was only after they agreed to give compensation to the municipalities for the franchises for which they were clamoring, that the legislation became possible. Hence, if there ever was a case for the interpretation of a public grant strictly against the grantee, this is the case. Every intendment in favor of the State and against exemption from taxation should be read into the act, were it necessary.

Counsel for the plaintiff in error has referred

to the memorandum filed by Governor Cleveland in connection with his approval of the act of 1884, and lays stress on the use of the word "tax" in such memorandum, and from this language an elaborate argument, based on the doctrine of contemporaneous interpretation, is sought to be built.

It is significant however, that the Legislature did not use the word "tax." The memorandum was intended merely as a statement in colloquial terms, of the reasons which prompted the Governor to approve the bill notwithstanding the objections to its passage which were urged upon him. He was not called upon to construe the act, but merely to indicate that the public interests required its passage.

As a historical document however, it is most valuable when read in connection with his veto of a similar statute passed by the Legislature of 1883. (*Public Papers of Governor Cleveland, 1883-4, pp. 95-103; 108-117.*)

In the ~~former~~ latter of these documents he discloses the forces at work, and the schemes employed to further the legislation. His introductory paragraph is significant:

"I have no doubt that a general law providing for the construction of street railroads should be enacted; but the provisions of this bill are such and my conviction of its questionable designs is so well settled, that I have determined to refuse to approve the same."

In the memorandum of 1884 he says:

"This bill in its various stages has given rise to exceptional discussion and the hopes and expectations of many people regarding the action

of the Legislature and of the Executive, in disposing of the measure, have given me proof *that extensive private interests are involved.* Painful rumors have been rife touching the methods employed by rival parties, to accomplish legislative results. These I hope are baseless, but they have, I fear, led many honest men to believe that the measure is wholly iniquitous and vicious. I am inclined for their information to state, *perhaps imperfectly,* but as briefly as possible, the general features of the bill, and some considerations which have constrained me to approve the same."

It is in the light of this gloss, that the isolated expressions which have been quoted should be read.

The acts of 1886 were passed after the legislative investigation had taken place, which led to the prosecution of the projectors of the Boardway Railroad, the indictment of the members of the Board of Aldermen, and the institution of the proceedings which culminated in *People* v. *O'Brien, 111 N. Y. 1.*

It would impute to the Legislature of 1886 a degree of brazenness and fatuity without parallel in the history of legislative bodies, if those acts were to be construed as involving the purpose, to the remotest extent, of exempting the grant of a railroad franchise derived under them, from taxation, past, present or future.

That such was not the state of the legislative mind at that time, is made apparent by the special message concerning street railroads addressed by Governor Hill to the Legislature, in connection with his approval of Chapter 65 of the Laws of 1886, out of which grew the amendment embodied in Chapter 642 of the Laws of 1886. (*Public*

Papers of Governor Hill, 1886, pp. 95-101.) That he did not have his mind on the subject of taxation appears from these passages:

"The Legislature, in 1884, passed what is known as the General Street Surface Railway Act. Among other things, it provided that the local authorities of any city may, at their option, sell at public auction the franchises of their streets for the operation of surface railroads. The fact was recognized, that such franchises, especially in the large cities, were valuable, and where there were rival applicants therefor it was believed that the local authorities, having the interests of their municipalities at heart would unquestionably avail themselves of this fair and honest method of disposing of said franchises. * * * It has been demonstrated that this discretionary power was unwise, and that the disposition of franchises at an open public sale should have been obligatory. Valuable franchises in the City of New York have been practically given away 'in the broad light of day and with a brazenness and boldness' unparalleled in the history of our municipalities. Recent developments have made clear the frauds and crimes by which such results were accomplished. Instead of exacting compensation for the city, its recreant officials have made themselves the beneficiaries of their official action, and their votes, rather than the franchises, have been sold to the highest bidder. The particular facts are too familiar to require detailed repetition. * * * All this was done against the protest of the citizens, and in spite of the fact that millions had been offered the city by responsible parties for the same franchise."

The plaintiff in error further argues that the Legislature, in passing the acts of 1884 and 1886, treated them as tax measures, because the official publications of the laws recite, and the jour-

nals of the Legislature disclose, that three-fifths of all the members elected to either house were present at their passage. From that fact it is argued, that because Article III, Section 21, of the Constitution, as then in force, required that three-fifths of all the members elected to either house should be necessary to constitute a quorum on the final passage of any act which imposes, continues or revives a tax or creates a debt or charge, these acts were, therefore, taxing measures.

An examination of any volume of the Session Laws of New York, will indicate that almost without exception the acts which they contain, irrespective of subject-matter recite that three-fifths were present. Opening the Session Laws of 1884 at random, innumerable acts, which have no possible relevancy to the subject of taxation or the appropriation of public money, are shown to have been passed by three-fifths. Chapter 249 relates to the overcrowding of jails; Chapter 257 to the incorporation of the Village of Lyons; Chapter 258 to the incorporation of St. Francis Monastery of the City of Brooklyn; Chapter 260 to the incorporation of the United States Loan and Security Company; Chapter 261 enables the New York and Harlem Railroad Company to enlarge its passenger depot at 42nd street in the City of New York; Chapter 267 amends the act authorizing the formation of corporations for manufacturing purposes; Chapter 269 prohibits the killing of woodcock and squirrels; Chapter 277 amends the Code of Civil Procedure; Chapter 278 provides for the proper removal of stable manure from the City of New York; Chapter 282 changes the name of

Reservoir Square in the City of New York to Bryant Park.

It is clear that the Legislature did not intend to deal with the subject of taxation, or of exemption from taxation. At all events it cannot be said, that an intention to deal with those subjects existed beyond question, and unless the case is thus clear, there can be no implication of a contract.

As was said by Chief Justice Marshall in *Providence Bank v. Billings, 4 Peters, 514:*

"We must look for the exemption in the language of the instrument, and if we do not find it there it would be going very far to insert it by construction."

In *Farrington* v. *Tennessee, 95 U. S. 686,* which is relied on by the plaintiff in error, and where the claim of tax exemption was predicated in the words "which shall be in lieu of all other taxes", Mr. Justice Swayne said:

"The exercise of the taxing power is vital to the functions of government. Except where specially restrained, the States possess it to the fullest extent. Prima facie it extends to all property, corporeal and incorporeal, and to every business by which livelihood or profit is sought to be made within their jurisdiction. When exemption is claimed, it must be shown indubitably to exist. At the outset every presumption is against it. A well founded doubt is fatal to the claim. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported."

See cases cited in *Vicksburg &c. R. R. Co. v. Dennis, 116 U. S., 68.*

To quote more fully from the opinion of Mr. Justice Peckham in *Wells v. Savannah,, 181 U. S., 539*, than the plaintiff in error has, it is apparent that the relator's entire argument proceeds upon a *petitio principii*:

"Taking all the foregoing facts into consideration, including the ordinance of 1790, and the deeds executed under it, we are unable to see that any contract of exemption has been proved. The payment of taxes on property otherwise liable to taxation, can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a good consideration therefor. *If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract.* The facts proved must show either a contract expressed in terms, *or else it must be implied from facts which leave no room for doubt that such was the intention of the parties* and that a valid consideration existed for the contract. *If there be any doubt on these matters the contract has not been proven and the exemption does not exist.*"

In *Skaneateles Water Company v. Skaneateles, 184 U. S., 363*, Mr. Justice Peckham said:

"There is no implied contract in the ordinary granting of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication."

In the language of Mr. Justice Holmes in *Knoxville Water Company v. Knoxville, 189 U. S., 436:*

"The trouble at the bottom of the company's case is, that the supposed promise of the city, on which it is founded, does not exist. If such a promise had been intended, it was far too important to be left to implication."

In support of the contrary contention *United States* vs. *Babbit,* 1 *Black,* 55 and other similar cases are cited, to the effect that what is implied in a statute, pleading, contract, or will, is as much a part of it, as what is expressed. That was an action against a public officer on a statutory bond, an instrument governed by general rules. Even there the principle declared was not made the basis of the decision rendered.

That this Court had no intention to relax the doctrine of interpretation of public grant as laid down in *Charles River Bridge* vs. *Warren Bridge,* appears from the opinion of Mr. Justice Clifford in *Rice* vs. *Minnesota R. R. Co.,* 1 *Black,* 379, 380, where after referring to that case he says:

"Later decisions of this court regard the rule as settled, that public grants are to be construed strictly, *and that nothing passes by implication.* That rule was applied in the case of Mills *vs.* St. Clair Co., 8 How., 581, and the court say, the rule is, that if the meaning of the words be doubtful in a grant designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the government, and therefore *should not be extended by implication* in favor of the grantee beyond the natural and obvious meaning of the words employed: and if those do not support the right claimed, it must fall. Any ambiguity in the terms of the contract say the court in the case of The Richmond R. R. Co. *vs.* Louisa R. R. Co., 13 How., 81, *must operate against the*

corporation, and in favor of the public, and the corporation can claim nothing but what was given in the act. Taken together these several cases may be regarded as establishing the general doctrine that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, *and that nothing passes but what is granted in clear and explicit terms.*

Ohio Life and Trust Co. *vs.* Debolt, 16 How., 435."

National Bank vs. *Graham*, 100 *U. S.*, 703, and *County of Wilson* vs. *National Bank*, 103 *U. S.*, 778, both involved questions of *ultra vires*, and necessarily proceeded on considerations not applicable here.

The plaintiff in error, in support of the contention that a contract of exemption from taxation is to be implied from the fact that the acts under which the relator has acquired its franchises required the payment to the City of New York of a certain percentage of the gross receipts, relies on *Union Bank v. State*, 9 *Yerger* (*Tenn.*) 490, 495 and *Attorney General v. Bank of Charlotte*, 4 Jones Eq. (N. C.), 287.

Neither of these cases, when analyzed, will be found to apply here. Each of them related to the charter of a bank, which conferred corporate life—the franchise to be. In return for these franchises, the banks were to pay to the State annually, a certain percentage on the amount of their capital stock. There was no reservation of the power to amend, modify or alter the charters. By subsequent legislation it was attempted to increase the amount required to be paid, as a condition for the continuance of the corporate exist-

ence. It was this legislation which was claimed to impair the obligation of the contract contained in the original charter, which was to the effect that the corporation might exercise its corporate powers for a specified consideration. The imposition of an increased consideration was asserted to be violative of the original contract.

These cases would be applicable here (excluding from consideration for the moment the reserved power of amendment), if the Legislature had attempted to increase the consideration which the relator was required to pay for the grant of the franchises which it had acquired under the acts on which it predicates its enjoyment of such franchises.

The act of 1899, in no way seeks to increase the amount to be paid as such consideration. It does not affect the relator's franchise to be a corporation. It does not interfere with the grant of the franchise which is carved out of the public streets and avenues of the City of New York. It merely treats that franchise, or easement, as it might properly be termed, after it has come into existence as property, in the same manner as other property is treated, and taxes it as other property is taxed.

The main difficulty with the contention of the plaintiff in error has resulted from a confusion of ideas—a lack of differentiation between the grant from the State and the thing granted, between the creation of a corporation to exercise certain privileges, and a valuable property right which is conferred upon the corporation, which is separable from the corporate existence, from the exercise of corporate powers; which survives the corporation; which may be sold and conveyed to another corporation; which has attached to it all of the attri-

butes of an easement appurtenant to public property, and which, in character, is similar to a right of ferriage, of wharfage, of maintaining a bridge, and of light, air and access to property located on the line of a public highway.

That this distinction exists between the cases cited and the present, is made clear from the reasoning of the Supreme Court of North Carolina in the case in 4 *Jones Equity*, at *page* 293, where it is argued that the tax sought to be imposed in that case increased the consideration paid for the grant emanating from the State, and did not amount to taxation of any property which was created by the grant.

In both of the cases, no property resulted from the grant. The only franchises which the corporations acquired were those of existing as banking corporations and exercising banking powers.

It should also be noted that that portion of the opinion in *Union Bank* v. *State* (*supra*), which is relied upon by the plaintiff in error, did not state the actual ground of decision, and was *obiter dictum*. On page 498 the Court says:

"But let us inquire, in the second place, whether it was the intention of the framers of the Constitution, and the Legislature of 1836, to enforce additional taxation on these corporate institutions which had previously been brought into existence, and which had contracted to pay a valuable consideration for the privileges which had been granted them. We are clearly of the opinion that they did not."

Moreover, the acts under which the several relator's franchises were acquired, reserved the power to alter, amend or repeal their several pro-

visions. Hence, the doctrine to which we have adverted under Point II, subdivision (*i*), pages 65 to 76 of the main brief No. 79, abundantly supports the right of the Legislature, by means of the Special Franchise Tax Law, to impose a new obligation on the relator with respect to the franchises derived from it.

Plaintiff in error, suggests that this doctrine is not applicable here, because the reserved power, it is said, does not sanction the destruction of vested property rights and cites *People* v. *O'Brien*, 111 *N. Y.*, 1; *Commonwealth* v. *Essex Company*, 13 *Gray*, 239; and *Stearns* v. *Minnesota*, 179 *U. S.*, 223, in support of the suggestion. We insist that it involves considerations foreign to the present case. The Act of 1899, does not attempt to destroy any rights, vested or otherwise. It does not annul, or confiscate the relator's franchise, or divest it, of its grant; or to interfere with its enjoyment of the privileges conferred. On the contrary, it recognizes the existence of the special franchises as granted, their ownership by the relator, their character as property, and deals with them in precisely the same manner as it does with the general mass of taxable property within the jurisdiction of the State.

In *People* v. *O'Brien* (*supra*), the Legislature undertook to annul the franchise of the Broadway Railroad, and to confiscate it; to deprive the stockholders, and bondholders of the corporation, who were the actual owners of the franchise, of their vested rights of property; to annihilate and destroy property. To say as plaintiff in error now does, that the State, whose courts have thus protected the property rights residing in this franchise, is precluded from taxing such property

rights, in spite of the constitutional and statutory reservation of the power to modify and amend the act conferring the franchise, would lay down a doctrine, fraught with infinite perils to the very existence of the State.

Although in *Commonwealth* v. *Essex Company* (*supra*), notwithstanding the payment of the stipulated consideration for the grant of the right to construct a dam, and the satisfaction of all damages to the owners of fisheries above the dam, it was attempted to interfere with the vested right of maintaining the dam, by requiring the construction of fish-ways in the dam, that decision is seriously questioned, and effectually limited in *Holyoke Water Power Co.* vs. *Lyman*, 15 *Wall.*, 500, where full effect was given to the "reserved power" in a case arising on similar facts. Mr. Justice Clifford after referring to the case cited, said:

"Vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, and *to protect the rights of the public*, and of the corporators, and to promote the due administration of the affairs of the corporation."

This language was adopted by Mr. Justice Gray in *Looker* vs. *Maynard*, 179 U. S., 52, and was acted on in *Spring Valley Waterworks* vs. *Schottler*, 110 *U. S.*, 37, and *N. Y. & N. E. R. R. Co.* vs. *Bristol*, 151 *U. S.*, 567, in all of which there was infinitely better reason for contending that there had been an interference with, or partial destruction or impairment of vested rights, than in the present case, which in the last analysis

amounts merely to the exercise by the State of its taxing power, with respect to property, which through its grace, and bounty, has come into existence and which requires its protection to a greater degree, than almost any other species of property, within its sovereignty.

To come finally to *Stearns* vs. *Minnesota* (*supra*), decided within six weeks after *Looker* vs. *Maynard*. There the State acquired from the United States, in trust, public lands to be conveyed to certain railroad companies in aid of their undertakings. It granted the lands on specified conditions to certain railroad companies. The grant which was in the form of a statute provided that in consideration of the lands granted and of the rights, privileges and franchises theretofore granted to the company "the said company shall, on or before the first of March of each and every year after said railroad is completed and in operation, pay into the treasury of the State three per cent. on the gross earnings of said railroad, *which sum shall be in lieu and in full of all taxation and assessments upon the said railroad, its appurtenances, and appendages and all other property of said company, including the land hereby and heretofore granted to said company, or so intended to be granted.*" A proviso followed by which the lands granted were made "subject to like lands of individuals to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any land is sold or contracted to be sold by said company." The act declared that when accepted it should become obligatory upon the State and upon the company. It was accepted and the railroad was constructed in reliance upon the act, and taxes

were paid thereunder, no tax being assessed on the lands held by the companies until 1895. Whether under the State Constitution as in force prior to 1871 there was power to grant any exemption from taxation was a mooted question; but by an amendment adopted in that year, the validity of this legislation was recognized, and its repeal or amendment was not to take effect, or be in force without being first submitted to a vote of the people and ratified by a majority of the electors voting thereon. In 1896 the people ratified an act which required all lands theretofore granted by the State, or the United States to any railroad company to be assessed and taxed as other lands were taxed in the State, with certain unimportant exceptions. There was an express proviso "that said railroad companies shall continue to pay taxes into the State treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands."

While the majority of the court treated the contract of exemption as contained in the original act valid, and the minority treated it void under the State Constitution as it stood prior to 1871, the amendment adopted in that year was considered as a ratification of the statutory exemption, and it was held that the express contractual exemption of the property of the railroad company, as a whole, in consideration of a specified payment, could not be changed by the State, so as to continue the obligation in full, and at the same time to deny to the company, either in whole or in part, the exemption conferred by the contract.

time to deny to the company, either in whole or in part, the exemption conferred by the contract.

Referring to the reserved power of amendment, as applied to these peculiar facts, Mr. Justice Brewer said (p. 239):

"Giving to that power full scope, it may be said that if the prior legislation was unauthorized by the constitution, a repeal of the amendment would wipe out the whole provision in reference to railroad taxation, and subject all railroad property within the limits of the State to the ordinary rule in respect to taxation. So it may be that the reserved power of amendment carries with it the right to increase or diminish the rate per cent. of taxation. But a different question is presented when it is insisted that the power of amendment carries with it the right of continuing the rate per cent. as to part only, but not all of the property covered by the original contract."

Mr. Justice White, in his opinion, fully recognized the "reserved power of amendment" which he had shortly before applied in two cases involving taxation *Citizens' Savings Bank* vs. *Owensboro*, 173 *U. S.*, 936, and *Louisville* vs. *Bank of Louisville*, 174 *U. S.*, 439, saying:

"Before examining the scope of the act relied upon, it is important to bear in mind the relations which are engendered when a contract is entered into by a State subject to the reserved power to repeal, alter or amend. In such case an irrepealable contract protected from impairment under the Constitution of the United States, takes effect, because it is impossible to conceive that contract rights which are conferred, subject to the power of repeal, alteration or amendment are protected from an impairment which under the terms of the grant, the State has reserved a right to make."

After considering the unique circumstances of the case, the opinion continues:

"My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the State are concerned, and at the same time to destroy the reciprocal duty owed by the State, to the other contracting party, is not to repeal, alter or amend the contract at all, but whilst preserving it, to endeavor by an act of arbitrary power, to impose a burden incompatible with the very provisions and terms of the amendatory act itself."

This full statement of the case serves to point out the distinction between it and the present. There an express exemption from all taxation beyond the payment of three per cent. on gross receipts was contracted for, in the most solemn and formal phraseology. Here there was no agreement whatsoever for exemption from taxation. There the contract was not repealed, but continued by the subsequent legislation, with an attempt nevertheless to violate its terms, and the act imposing such additional taxation, was in effect a scheme to impose upon the railroad companies, the obligation of paying an additional consideration for property previously conveyed, the title to which had vested in them. Here the Act of 1899 does not seek to increase the consideration for the grant, but merely undertakes to tax the thing granted, just as the State of Minnesota might have taxed the lands which it had granted to the ~~State~~, after their conveyance to a third party. There is no incompatibility between the requirement that the relator pay, the consideration stipulated by the terms of the acts conferring upon it, its franchises, and the act which taxes them, after they have been acquired.

Finally, this case differs fundamentally from *Stearns* vs. *Minnesota*, in that here under the provisions of § 46 of the Tax Law the railroad companies are permitted, out of abundance of favor, as we believe, to deduct from the tax assessed on any special franchise any sum paid for its use within the next preceding year, "under any agreement therefor, or under any statute requiring the same * * * based upon a percentage of gross earnings or any other income, or license fee, which payment was in the nature of a tax." (*Heerwagen* vs. *Crosstown St. Ry Co.*, 179 *N. Y.*, 99.

The relator has no just ground for complaining of injustice, or arbitrary action, with respect to the assessment now under review, while in the case cited the converse was true.

The gross earnings of the relator for the year ending December 31, 1900, were $13,962,448.54, and the net earnings from operations were $7,242,208.36. (Rec. p. 347.)

It would seem, therefore, that the valuation of $12,313,200.37 placed on the special franchises, including the tangible property used in connection therewith, from which these enormous earnings were derived, has not imposed an unreasonable or excessive burden of taxation on the relator.

II.

As to the denial of equal protection of the laws.

Without repeating the argument which has been presented on this subject in No. 79, we will briefly

consider the charges of inequality urged by the relator in this case.

1. It is claimed that the legislature has arbitrarily exempted from taxation, under Section 35 of the Rapid Transit Law, competitors of the plaintiff in error, who it is said are conducting exactly the same business, by means of the subway.

The exemption provision referred to has no relevancy to a special franchise. It relates merely to the interest of the person, firm or corporation mentioned in § 35 of that act, under its contract with the City of New York for the construction of the subway and the operation of a railroad therein, and to the rolling stock and other equipment of the road.

It expressly provides, however, that "this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road." The Tax Law includes a special franchise in the definition of "real property." Hence we contend that there is no exemption, in fact, of the special franchise inherent in the subway. But it is unnecessary for us to argue that it is not exempted. The railroad referred to in the Rapid Transit Act is *sui generis*. It differs from every other railroad in the State. The company operating the subway does not own any special franchise in the sense that the relator and other corporations own them. The railroad, as well as the franchises, are the property of the City of New York. The construction of the subway, and of the railway which was placed within it, was undertaken by the City of New York as a result of

a popular vote, in favor of entering upon such an undertaking. The City issued its bonds to pay for this construction and, as an incident to the contract, the person, firm or corporation contracting to construct, maintain and operate the road was required to "annually pay into the treasury of said city as rental for the use of said road a sum which should not [except as provided in the act] be less than the annual interest upon the bonds to be issued by said city for the construction of said road * * * and in addition to said interest a further sum which should be equal to a percentage of not less than one per centum upon the whole amount of said bonds." *Laws of* 1900, *Chap.* 616, *Sec.* 34.

The duration of the lease was fixed by the Statute as not less than thirty-five nor more than fifty years. This legislation, which originated in Chapter 4 of the Laws of 1891, and was amended by Chapter 752 of the Laws of 1894, Chapter 519 of the Laws of 1895, Chapter 729 of the Laws of 1896 and Chapter 616 of the Laws of 1900, was made the subject of adjudication in *Sun Printing & Publishing Association* vs. *Mayor, etc., of New York*, 152 *N. Y.*, 257, where it was held that this legislation related to a "city purpose" and did not involve the loan of municipal credit.

In the course of his opinion, Judge Haight said:

"The acts in question under a fair construction, do not require the city to loan its credit to, or in aid of, any individual, association or corporation. It is provided that in case the road shall be constructed by and at the city's expense then and in that event, the road so constructed shall be and remain the absolute property of the city, so that whatever the municipality expends in the construc-

tion of the road is for the creation of its own property and is not in any sense a loan to an individual or corporation. It is said, however, that there is a provision for a lease of the road for a period not less than thirty-five nor more than fifty years and for successive renewals thereof; that a lease in perpetuity would be equivalent to ownership, and that the bonds issued by the city for construction would, in effect, be a loan of the credit of the city to the parties leasing the road; but such a construction would manifestly be violative of its spirit and intent. It would be in conflict with the express provision that the road should be and remain the absolute property of the city. It would not be in accord with the provision limiting the terms for which a lease may be made, and would not be in harmony with the provision requiring an appraisement or valuation of the property of the lessee employed in the equipment and operation of the the road at the end of the lease in case it should not be renewed to the same individual, association or company. * * * The city of New York is the owner of ferry rights, together with docks and piers which it has constructed upon its rivers. The docks and piers afford access to its water highways. These, with its ferry rights, it leases from time to time for specified terms. In that way it furnishes highways in which its inhabitants may engage in the transportation of persons and property, thus promoting the commerce of the city. Nothing more is authorized to be done with reference to the leasing of the proposed railroad. It would be used for the same purpose and promote and facilitate the travel of persons and commerce of the city. Nor do we think that a lease in perpetuity is permissible under the provisions of the act. * * * This view of the statute gives point to the provision declaring the road to be the property of the city and it dissipates the theory of ownership by the lessee by reason of a lease in perpetuity."

It is thus clear that the corporation operating

a railroad in the subway is not the owner of a special franchise, but that the franchise is the property of the City of New York. The ownership of this franchise, residing as it does in the public, under well settled rules, is not to be classified with property whose ownership is vested in individuals or private corporations.

2. It is claimed that the statute is unequal because the deductions permitted by Section 46 of the Act of 1899 discriminates in favor of corporations who make annual payments either of a fixed sum, or of a fixed percentage of gross receipts, or both, and against the owners of franchises who, because they make no payments "in the nature of a tax" are allowed no deductions.

So far as the relators are concerned it would seem that they are not aggrieved by this alleged discrimination. They are the beneficiaries of Section 46. The amount of tax which they are required to pay on their special franchises is reduced by the amount of payments made by them "in the nature of a tax". It does not therefore lie with them to attack for inequality a Statute under which they derive a benefit.*

Irrespective of this obvious answer to the contention of the plaintiff in error, it is submitted that the statute creates no inequality. On the contrary, it seeks to place the owners of special franchises on an equal footing. Those who have made no payments "in the nature of a tax" are required to pay a tax based on the full amount of their assessment. Those who have made such payments receive credit therefor. In other words, there is an equitable classification of the persons or corporations who are subjected to the special franchise tax similar to that which was

* Tyler v. Judges of Registration, 179 U.S. 405
Quaker City Nat'l Bank Co. 199 U.S. 23

recognized as valid in *Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, and Orr vs. Gillman, 183 U. S. 278* and other similar cases.

The New York tax law contains adequate provisions for the equalization of taxes. In the very proceedings which are now under review, the assessment of the relator was reduced 33⅓, because it was shown that other real property in the city of New York was assessed at only 67% of its full value.

In like manner, any inequalities in the assessment of franchises, based on the allowances of deductions, for which provision is made in Section 46, can be equalized by the Board of Tax Commissioners, or on a review of their determination in certiorari proceedings, and approximate mathematical equality accomplished.

Exact equality is a practical impossibility under any system of taxation and is not required. The present statute treats with equal hand all owners of special franchises in like circumstances. The act has merely permitted a deduction of a lien or charge against a special franchise, and this act of grace cannot be contorted into one of injustice. A single rule is applied which operates with entire equality upon all in like circumstances. To require more of a system of taxation would require the impossible. To sustain the contention of the plaintiff in error would nullify every known system of taxation.

Thus, in many States of the Union, including New York, one taxed on personal property may deduct from the value of his taxable personalty the amount of his indebtedness. A, B and C might each own $100,000 of taxable personal property. A might be free from debt, B might owe $10,000,

and C $100,000. A would have to pay taxes on an assessment of $100,000, B on $90,000, and C would pay no taxes at all. And yet it has never been questioned that an allowance of deductions for indebtedness does not conflict with the Constitution.

In *Bell's Gap Railroad* v. *Pennsylvania, 134 U. S. 232*, Mr. Justice Bradley recognized the right to allow deductions for indebtedness as within the range of the State's power to regulate taxation.

The deductions allowed under Section 46 of the Act of 1899, are founded on much more equitable considerations than the provisions generally found in laws regulating taxation, which permit deductions to be made. An extravagant, fanciful and theoretical case of apparent, but not real, inequality, will not suffice to invalidate an act designed to ensure the collection of revenues necessary for the support of government.

III.

It is respectfully submitted that the judgment under review should be affirmed.

JULIUS M. MAYER,
Attorney General of the
State of New York.

LOUIS MARSHALL,
Of Counsel.

Appendix A.

CHAP. 252 OF NEW YORK LAWS OF 1884.

An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages.

SECTION 1.—Any number of persons, not less than thirteen may make and sign articles of association, and form a company for the purpose of constructing, maintaining and operating a street surface railroad for public use in the conveyance of persons and property in cars for compensation, in any of the cities, towns or villages of this State, or in any two or more civil divisions thereof. Such articles of association shall state the name of the company, the number of years the same is to continue, the names of the cities, towns and villages, and the counties, and the names or description of the streets, avenues and highways in which the road is to be constructed, the places from and to which the road is to be constructed maintained and operated, the length of said road, or as near as may be, the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of road constructed, or proposed to be constructed and the number of shares of which said capital stock shall consist, and the names and places of residence of the seven or more directors of the company who shall manage its affairs for the first year, and until others are chosen in their places. Each subscriber of said articles of association shall subscribe thereto his name, place of residence, and number of shares of stock he

Corporations.

Articles of Association, what to contain.

Where to be filed. agrees to take in said company. Such articles of association shall be filed in the office of the Secretary of State when one thousand dollars of stock for every mile of railroad proposed to be constructed has been subscribed thereto, and ten per cent. thereon in good faith, in cash, to the directors named in said articles of association, and when there is indorsed on said articles of association or annexed thereto, an affidavit made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and ten per cent. paid in cash thereon, as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association. The Secretary of State shall indorse on said articles of association the day they are filed, and record the same and said affidavit in a book to be provided by him for that purpose; and from the date of such filing the persons who have so subscribed such articles of association, and all persons who shall become stockholder in such company shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions contained in title three of chapter eighteen of the first part of the revised Statutes, except the provisions contained in the seventh section of said title. Such corporation shall also have all the powers and privileges granted, and be subject to all the liabilities imposed by this Act, or by the Act entitled, "An Act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen

Duty of Secretary, etc.

Powers and privileges.

hundred and fifty, and the several acts amendatory thereof, except as the said acts are herein modified. No existing street surface railroad company shall extend its line, or construct any branch thereof under this act, until it has made and filed with the Secretary of State, a certificate signed by its board of directors, which certificate shall contain a statement of the names of the cities, towns, villages and counties, and the names or description of the streets, avenues and highways, in which such extension or branch is to be constructed, and places from and to which the same is to be constructed, maintained and operated, and the length thereof as near as may be.

Existing to file cate of sion.

Board of tors.

SEC. 2. The board of directors of every corporation formed under this act shall consist of not less than seven nor more than thirteen.

Terms ad ditions which may be structed.

SEC. 3. Any company organized as aforesaid, or any existing street surface railroad company or corporation heretofore organized for the purpose of building and operating a street railroad, may construct, maintain, operate, use and extend a railroad or branches on the surface of the soil, through, upon and along any of the streets, avenues, roads or highways of such cities, towns and villages, and also through, along and upon any private property which said company may acquire for the purpose, and may also construct such switches, sidings, turnouts and turntables and suitable stands as may be necessary, for the convenient working of such road, provided that the consent in writing of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that

portion of a street or highway upon which it is proposed to construct or operate such railroad be after the passage of this act first obtained. The consent of such owners shall be acknowledged as are deeds entitled to be recorded. In any city the common council acting subject to the power now possessed by the mayor to veto ordinances, and in any village the board of trustees shall be the local authorities to give all the consents required under this act in respect of such city or vilage. Provided that where in any city the exclusive control of any street, road, highway, avenue or property which is to be used or occupied by any such company, is, by law, vested in any local authority other than the common council of such city the consent of the local authorities in whom such exclusive control is so vested shall be also obtained.

Notice of application to be published, etc.

SEC. 4. In incorporated cities, before acting upon an application for their consent, the local authorities shall give public notice of such application and of the time and place when such application will first be considered by a notice thereof, to be published daily for at least fourteen days in two daily newspapers of said city, to be designated by the mayor of the city. And when such application is made to the local authorities of any incorporated village, the notice of such application shall be published for at least fourteen days in a newspaper published in said village, if any there shall be, if none, then in two daily newspapers published in the city nearest such village. The consent of the local authorities shall in all cases be applied for in writing, and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with,

and shall be filed in the office of the county clerk of the county in which said railroad is located. Any consent so given by said local authorities shall cease and determine at the expiration of one year thereafter, unless prior to the expiration of such period the company obtaining such consent shall have filed the consent of the requisite amount in value of property owners or the determination of commissioners confirmed by the Court, as herein provided. The consent of the local authorities, given as aforesaid, shall operate as the consent of such city, town or village, as the owners of any property, that such railroad may be constructed, maintained and operated in, upon and along any street, avenue, road or highway by which such property is bounded, except that where such railroad runs through any street or avenue bounded on one side by any public park or square the consent of one-half the owners of property on the other side of said street or avenue, and opposite such park or square shall also be first obtained. For the purposes of this act the value of the property so bounded shall be ascertained and determined from the assessment roll of the city or town in which such property is situated, confirmed or completed last before the local authorities shall have given their consent, excepting such property owned by such city, town or village, the value of which shall be ascertained and determined by allowing therefor the same price or value as is shown by such assessment roll to be the value of the equivalent in size and frontage of any adjacent property on the same street. In case the consent of property owners required by any provision of this act cannot be obtained, the company so failing to obtain such

Consen
cal aut
when t
etc.

Value,
ermine

consents may apply to any General Term of the Supreme Court, held in the district in which the road of such company is proposed to be constructed, for an appointment of three commissioners to determine, after a hearing of all parties interested, whether such railroads ought to be constructed and operated.

ceedings in
se of failure
obtain con-
nt of proper-
owners.

Id.

SEC. 5. Notice of such application shall be served personally upon each property owner not having given his consent by delivering the same to him or his agent or representative, as such owner, agent or representative appears upon such assessment roll of the city or town in which the property is situated; or by mailing the same, properly folded and directed to such owner, agent or representative, at the post office nearest his usual place of residence, with the postage paid thereon, at least ten days prior to such application. If the person on whom such service is to be made is unknown, or his residence is unknown, and cannot by reasonable diligence be ascertained, no service of such notice, personally or by mail, need be made. And said General Term of the Supreme Court to which such application is made, upon due proof of the service aforesaid, shall appoint three disinterested persons, who shall act as commissioners, and said commissioners, within ten days after their appointment, shall cause public notice to be given of their first sitting, in the manner directed by said General Term, and may adjourn from time to time until all their business is completed. Vacancies may be filled by said General Term, after such notice to persons interested as it may deem proper to be given, and the evidence taken before as well as after the occurring of the vacancy shall be deemed to be properly before said commissioners.

Sec. 6. The said commissioners shall determine, after such public hearing of all parties interested, whether such railroad ought to be constructed and operated, and shall make a report thereon, together with the evidence taken, to said general term, and their determination that such road ought to be constructed and operated, confirmed by said Court, shall be taken in lieu of the consent of the property owners before mentioned. Such report shall be made within sixty days after appointment of said commissioners, unless the said court or a judge thereof shall, for good cause shown, extend such time.

Comm to d whet ought constr etc.

Sec. 7. *The local authorities* of any incorporated city or village to whom application, under the provisions of this act, may be made for consent to the construction, maintenance, use, operation or extension of a street surface railroad upon any street, road, avenue or highway, *may at their option, provide for the sale of, and sell at public auction the franchise, subject to all the provisions of this act, to so construct, maintain, use,* operate *or extend such street surface railway.* Prior to such sale, notice of the time, place and terms thereof, and of the route to be sold, and of the conditions upon which the consent of said local authorities to the construction, maintenance, use, operation or extension of a street surface railroad thereon will be given, shall be published three times a week for at least three weeks, in two daily newspapers of the said city, to be designated by the mayor of said city. And local authorities of any incorporated village shall, prior to any sale by them, as herein provided, cause the above notice provided for to be published three

Local ties m vide fo franch

times a week for at least three weeks in a newspaper published in said village, if any there shall be, if none, then in two daily newspapers published in the city nearest such village.

Cities having population of, 250,000 or more corporation to pay percentage of gross receipts into city treasury.

Sec. 8. *Every corporation incorporated under, or constructing or operating a railroad constructed or extended under the provisions of this act, within the cities of the State having a population of two hundred and fifty thousand or more, as aforesaid, shall for and during the first five years after the commencement of the operation of any portion of its railroad, annually, on the first day of November, pay into the treasury of said respective cities in which its road is located to the credit of the sinking fund thereof, three per cent. of its gross receipts for and during the year ending the next preceding thirtieth day of September, and after the expiration of said five years, make a like annual payment into the treasury of said respective cities, for the credit of said sinking funds, of five per cent. instead of three per cent. of said gross receipts; provided, however, that every corporation now existing and operating a street surface railroad which shall extend its tracks or construct branches therefrom, and operate such extensions or branches under the provisions of this act, or the corporation operating such branches or extensions, shall pay such percentages as aforesaid only upon such portion of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension and branches shall bear to the entire length of its tracks. In any other incorporated city or village the local authorities shall have the right to require, as a condition to their*

consent to the construction, operation or extension of a railroad under the provisions of this act, the payment annually of such percentage of gross receipts, not exceeding three per cent., into the treasury of said city or village, as they may deem proper. In case of extension the amount to be paid shall be ascertained in the manner hereinbefore provided. The company or corporation failing to pay such percentage of its gross earnings, as aforesaid, shall, after said first day of November, pay in addition thereto, five per cent. a month on such percentage until paid. The president and treasurer of any company required by the provisions of this act to make a payment annually upon its gross receipts shall, on or before the first day of November in each year, make a verified report to the comptroller or treasurer of the city, of the gross amount of its receipts for the year ending the next preceding thirtieth day of September, and the books of said company shall be open to inspection and examination by said comptroller, treasurer, or his duly appointed agent, for the purpose of ascertaining the correctness of said report as to said gross receipts. The corporate rights, privileges and franchises acquired under this act, by any corporation which shall fail to comply with all the provisions of this section, shall be forfeited to the people of the state of New York, and upon judgment of forfeiture rendered in a suit brought in the name of the people by the attorney-general, shall cease and determine. Any person intentionally making a report as herein provided, which shall be false, shall be guilty of perjury.

Officers to verified rep

Sec. 9. Every such corporation incorporated

Corporation to keep streets in repair.

under, or constructing, extending or operating a railroad constructed or extended under the provisions of this act, within the incorporated cities and villages of this state, shall also, whenever and as required and under the supervision of the proper local authorities have and keep in permanent repair the portion of every street and avenue between its tracks, the rails of its tracks, and a space two feet in width outside and adjoining the outside rails of its track or tracks so long as it shall continue to use such tracks so constructed under the provisions of this act. In case of the neglect of such corporations to make such pavement or repairs, the local authorities may make the same at the expense of such corporation, after the expiration of thirty days' notice to do so. The local authorities having charge of streets, avenues, roads or highways in cities and incorporated villages may make such reasonable ordinances or regulations as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interest and convenience of the public may require. A corporation whose servants or agents willfully or negligently violate such an ordinance or regulation, as aforesaid, shall be liable to such city or village for a penalty not exceeding five hundred dollars.

Ordinances as to rate of speed, etc

SEC. 10. In case any corporation incorporated under this act or seeking to extend its road under the provisions thereof, shall not commence the construction or extension of its road within one year after it has acquired the consent of the local authorities and property owners, or determination of the general term of the supreme court, as herein required, and shall not com-

Within what time road to be built.

plete the same within three years after obtaining such consents, its rights, privileges and franchises acquired under the provisions of this act shall cease and determine. During the pendency of legal proceedings the supreme court shall have power to extend the period for the performance of any act herein required.

~~Of Counsel.~~

Compen of comm ers.

§ 11. The commissioners provided for in this act, to be appointed by the general term, shall receive the sum of ten dollars each per day for each and every day they may be engaged, and the charges, expenses and disbursements of such commissioners shall be paid by the company making the application for their appointment.

Motive

§ 12. Any street surface railway company may in any case operate any portion of its road by animal or horse power, or by any power other than locomotive steam power, which may be consented to by the local authorities and by a majority of the property owners, obtained in accordance with sections three and four of this act.

Rate o

§ 13. No company or corporation incorporated under, or constructing and operating a railroad under the provisions of this act, shall charge any passenger more than five cents for one continuous ride from any point on its road or on any road or line or branch operated by it or under its control to any other point thereon or any connecting branch thereof within the limits of any incorporated city or village. This section shall not be construed to any part of any road heretofore constructed, and now in operation, unless such company shall acquire the right to extend such road,

or to construct branches thereof under the provisions of this act, in which event its rate of fare shall not exceed its authorized rates prior to such extension.

§ 14. Except for necessary crossings no street surface railroad company shall construct, extend or operate its road or operate its road or tracks in that portion of any street, avenue, road or highway in which a street surface railroad is, or shall be lawfully constructed except with the consent of the company owning and maintaining the same, provided, however, that any two or more railroad companies now existing, or hereafter formed under the provisions of this act, may join and unite and use each other's tracks for a distance not exceeding one thousand feet, whatever the court, upon an application for the appointment of commissioners, next hereinafter provided, shall be satisfied that such use is actually necessary to connect main portions of a line to be constructed as an independent railroad, and that the public convenience requires the same, in which event the right of such use shall be given only for a compensation to an extent and in a manner to be ascertained and determined by commissioners to be appointed by the courts, as provided in respect to acquiring title to real estate under chapter one hundred and forty of the laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," and the several acts amendatory thereof; or by the board of railroad commissioners in cases where the companies interested shall unite in a request for such board to act. Such commissioners, in determining the compensation to be paid for the use

by one company of the tracks of another, shall consider and allow for the use of tracks and for all injury and damage to the company whose tracks may be so used.

Corporat may lease tions of track to o corporatio

§ 15. It shall be lawful for any street surface railroad company or companies to lease, or to transfer its or their right, subject to all its or their obligations in respect thereof, to run upon or to use any portion of its or their railroad tracks to any other street surface railroad company authorized to run upon such route, upon such terms as may be agreed upon by a majority of the respective boards of directors thereof, subject to approval or rejection by a vote of a majority of the stock represented at meetings of the stockholders of each of such companies, called for that purpose, and held within three months after such agreement shall have been adopted by the several boards of directors. But nothing in this section shall be construed to authorize any railroad company in cities of over three hundred thousand population, to lease its rights or franchises to any other company in said cities which owns and operates a road parallel thereto.

No road to construct under cha 606, laws 1875.

§ 16. No street surface railroad shall be constructed to run in whole or in part upon the surface of any street or highway under the authority of any commission appointed under the provisions of chapter six hundred and six of the laws of eighteen hundred and seventy-five, entitled "An act further to provide for the construction and operation of a steam railway or railways in counties of the state" or the acts in addition thereto or amendatory thereof.

Nor upon ground occupied by public buildings etc.

§ 17. No street surface railroad shall be constructed or extended under the provision of this act upon ground occupied by buildings belonging to any town, city, county, or to this state, or to the United States, or in public parks, except in tunnels to be approved by the local authorities having control of such parks.

Inconsistent acts repealed.

§ 18. All acts and parts of acts whether general or special, inconsistent with this act are hereby repealed, but nothing in this act shall revive or make valid for the purposes of this act any consents of property owners or local authorities, obtained prior to the passage of this act, or shall interfere with or repeal or invalidate any rights heretofore acquired under the laws of this state by any horse railroad company or affect, or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road in accordance with the terms and provisions of its charter, and the acts amendatory thereof, or revive any charter which has become lapsed or forfeited, or any pending litigation.

§ 19. *The legislature may at any time alter, amend or repeal this act.*

§ 20. This act shall take effect immediately.

Appendix B.

Chapter 65 of New York Laws of 1886.

An act *to secure adequate compensation for the right to construct, maintain, use, operate or extend street railroads in cities and villages.*

Section 1. The local authorities of any incorporated city or village to whom application may be made for consent to the construction, maintenance, use, operation or extension of a street railroad or a railroad or railway for the transportation of passengers, mails or freight over, upon, under, through or across any of the streets, roads, avenues parks or public places in such city or village, must provide as a condition of the said consent to the use of said street, road, avenue, park or public place, *that the right, franchise and privilege of using the said street, road, avenue, park or public place, shall be sold at public auction to the bidder who will give the largest percentage per annum of the gross receipts derived from the operation of said railroad or railway* with adequate security as hereinafter provided for the payment of such percentage, provided that in cities having a population of two hundred and fifty thousand or more, such percentage shall in no case be less than three per centum per annum of such gross receipts for and during the period of the first five years of the operation of any portion of said railroad or railway, and five per centum per annum of such gross receipts after the expiration of five years. The Legislature expressly reserves the right to regulate and reduce the rate of fare on such railroad or railway. Prior to such sale notice of the

Local authorities must require railroad franchises to be sold.

Manner of

Security to be given.

Percentage in certain cities

Right to reduce fare reserved

time, place and terms thereof, and of the route to be sold, and of the conditions upon which the consent of said local authorities to the construction, maintenance, use, operation or extension of such street railroad or any railroad or railway carrying freight, passengers or mails over or under any of the streets, roads, avenues, parks or public places of any incorporated city or village will be given, shall be published three times a week for at least three weeks in two daily newspapers of said city, to be designated by the Mayor of said city. And the local authorities of any incorporated village shall, prior to any sale by them as herein provided, cause the notice above provided for, to be published for at least three weeks in a newspaper published in said village, if any there shall be; if none, then in two daily newspapers published in the city nearest said village.

Notice of sale of franchise.

§ 2. This act shall apply to all applications for consent to construct, maintain, use, operate or extend such street railroads or railways as aforesaid, made under or in pursuance of any statute, whether such application is hereafter made or may have been heretofore made, but not at the passage of this act finally acted upon by the local authorities, and also to applications upon which such local authorities have finally acted, but which have not at that time been made final by the consent of the owners of a sufficient proportion of the property, situated upon the line of the proposed railroad or railway, or by the approval of the General Term of the Supreme Court.

Act to apply to pending and future railway applications.

§ 3. The security required by section one of this

act shall be a bond or undertaking in writing and under seal, in such form, condition, amount and sureties as shall be required and approved by the Mayor and Common Council of any such city and by the trustees of any such village.

Repeal of tion prov for opti sale of chise.

§ 4. Section seven of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, entitled "An act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages," and all amendments of said section are hereby repealed.

§ 5. This act shall take effect immediately.

Appendix C.

CHAPTER 642 OF NEW YORK LAWS OF 1886.

AN ACT to amend chapter sixty-five of the laws of eighteen hundred and eighty-six, entitled "An act *to secure adequate compensation for the right to construct, maintain, use, operate or extend street railroads in cities and villages.*"

Section 1 Chapter sixty-five of the laws of eighteen hundred and eighty-six is hereby amended so as to read as follows:

cal authorities must receive railroad franchises to be sold.

SEC. 1. The local authorities of any incorporated city or village, to whom application may be made for consent to the construction, maintenance, use, operation or extension of a street railroad or a railroad or railway for the transportation of passengers, mails or freight, over, upon, under or through any of the streets, roads, avenues, parks or public places in such city or village must provide, as a condition of the said consent to the use of said street, road, avenue, park or public place, *that the right, franchise and privilege of using the said street, road, avenue, park or public place shall be sold at public auction to the bidder who will agree to give the largest percentage per annum of the gross receipts of said company or corporation,* with adequate security as hereinafter provided, for the fulfillment of said agreement and for the commencement and completion of such road according to the plan or plans, and on the route or routes fixed for its construction within the time or times hereinafter designated and prescribed therefor, but this

ner of sale.

curity to be en.

agreement shall not release any such road from the percentages required to be paid by chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four. The Legislature expressly reserves the right to regulate and reduce the rate of fare on such railroad or railway. The local authorities of any city or village may give such consent to any applicant therefor duly incorporated and existing under the laws of this State for the purpose of providing street railroad facilities *for compensation* in said city or village; and the bidder to which such consent may be sold shall be an incorporated railroad or railway company, organized to construct, maintain and operate a street railroad in the city or village for which such consent may be given. Prior to such sale, notice of the time, place and terms thereof, and of the route or routes to be sold, and of the conditions upon which the consent of said local authorities to the construction, maintenance, use, operation or extension of such street surface railroad or any railroad or railway carrying freight, passengers or mails over, under or upon any of the streets, roads, avenues, parks or public places of any incorporated city or village will be given, shall be published three times a week for at least three weeks in two daily newspapers of said city, to be designated by the mayor of said city, except in cities where two daily papers are not published, then said notices shall be published at least once a week for at least three weeks successively in a newspaper published in said city, to be designated by the mayor. And the local authorities of any incorporated village shall, prior to any sale by them as herein provided, cause the notice above provided for, to be published for at least three weeks

Proviso as to percentages under act of

Right to regulate fare.

Consent to be sold to incorporated railroad company

Notice of

How published in cities

w published illages.

es, by whom ducted.

ncellation of s.

nstruction, en to be mmenced l finished.

ccounts of ness and ings to be t.

bit to be for- d on non- yment of ntages.

in a newspaper published in said village, if any there shall be; if none, then in two daily newspapers published in the city nearest said village. The comptroller or other chief fiscal officer, of the cities, and the president of the board of trustees in villages, shall attend and conduct the sale to be made under the provisions of this act, and may adjourn the same from time to time, not exceeding twice, for a period not exceeding four weeks in the aggregate, and may cancel the bid if the bidder shall not furnish satisfactory security, and sell the said consent and license in the same manner as above provided. The bidder or bidders to whom the said consent or license shall be sold, shall commence the construction of the said road within one year, and complete the same within three years from the date of sale. The said bidder who may build and operate said railroad, shall at all times keep accurate books of account of the business and earnings of such railroad, which books shall at all times be subject to the inspection of the local authorities of the city or village; *and in the event of the failure or refusal of the party or corporation operating or using the railroad to be constructed as aforesaid, to pay the rental or percentage of gross earnings agreed upon, then, upon notice to the said party or corporation—of not less than sixty days—the said consent and right to operate such railroad may be declared forfeited, and the same may be resold to the highest bidder in the manner above provided.* Such forfeiture may be decreed or ordered by the judgment of any court having jurisdiction, after the party or corporation shall have opportunity to be heard in their defense.

§ 2. This act shall apply to all applications for consents by such local authorities, to construct, maintain, use, operate or extend such street railroads or railways as aforesaid, made under or in pursuance of any statute, whether such application is hereafter made, or may have been heretofore made, but not at the passage of this act finally acted upon by the local authorities; and all consents hereafter given by said local authorities shall cease and determine at the expiration of two years thereafter, and all such consents heretofore given shall cease and determine at the expiration of two years from the date of the passage of this act, unless prior to the expiration of such period or periods the consent of the owners of a sufficient proportion of the property situated on the line of the proposed railroad or railway, or the approval of the general term of the supreme court shall have been obtained. None of the provisions of this act, or of chapter sixty-five of the laws of eighteen hundred and eighty-six except the provisions of this section in relation to the determination of the consents of said local authorities shall apply to companies now organized or hereafter to be organized for the purpose of building elevated railroads in counties having less than one million inhabitants, nor to street surface railroad companies heretofore organized in cities or villages of less than forty thousand inhabitants.

Act to a pending ture ra applicat

Consent to cease termine.

Acts o how and applicat

§ 3. The security required by section one of this act shall be a bond or undertaking in writing and under seal, in such form, condition, amount and sureties as shall be required and approved by the comptroller or other chief fiscal officer of any such city, and by the trustees of any such village.

Securi bond, h proved.

§ 4. This act shall not affect the New York Arcade Railway Company nor the rights possessed by it.

§ 5. Section seven of chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four, entitled "An act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages," and all amendments of said section, and all acts or parts of acts inconsistent herewith are hereby repealed.

§ 6. This act shall take effect immediately.

being section 93 of Article V, Chapter 565 of the Laws of 1890, known as the Railroad Law:

§ 93. "CONDITION UPON WHICH CONSENT SHALL BE GIVEN; SALE OF FRANCHISE AT PUBLIC AUCTION.—The consent of the municipal authorities in cities containing ninety thousand inhabitants or over according to the last federal census, must contain the condition that the right, franchise and privilege of using any street, highway, avenue, park or public place shall be sold at public auction to the bidder who will agree to give the city the largest percentage per annum of the gross receipts of such corporation, with a bond or undertaking in such form or amount and with such conditions and sureties as may be required and approved by the comptroller or other chief fiscal officer of the city for the fulfillment of such agreement; and for the commencement within one year of such road, and its completion within three years from the date of sale according to the plan or plans, and on the route or routes fixed for its construction. The bidder to whom such right, franchise and privilege may be sold must be a duly incorporated railroad corporation of this state, organized to construct, maintain and operate a street railroad in the city for which such consent may be given. Notice of the time, place and terms of sale, and of the route or routes to be sold, and of the conditions upon which the consent of the municipal authorities to the construction and operation and extension of such street railroad will be given, must be published by such authorities for at least three successive weeks, and in any city having two or more daily newspapers at least three times a week in two of such papers, to be designated by the mayor, and in any city where two daily newspapers are not published, at least once a week in a newspaper published therein, to be designated by the mayor. The

comptroller or other chief fiscal officer of the city shall attend and conduct such sale, and may twice adjourned the same, but not more than four weeks in all, and may cancel any bid if the bidder does not furnish adequate security or otherwise comply with the terms and conditions of sale, and may resell the consent and license in the same manner as herein provided for the first sale. The bidder who may build and operate such railroad shall at all times keep accurate books of account of the business and earnings of such railroad, which books shall at all times be subject to the inspection of the municipal authorities. In the event of the failure or refusal of the party or corporation operating or using such railroad to pay the rental or percentage of gross earnings agreed upon, and after notice of not less than sixty days to pay the same, the consent and right to operate such railroad may be declared forfeited by the judgment of any court having jurisdiction after the party or corporation shall have had opportunity to be heard in its defense; and the same may be again sold to the highest bidder in the manner above provided. All consents given by the municipal authorities shall cease and determine at the expiration of two years thereafter, unless prior thereto the consent of a sufficient number of the property owners, or the order of the general term in lieu thereof, shall have been first obtained, and the provisions of this section shall apply to all applications for such consents made under any statute, either before or after the passage of this chapter, and not finally acted upon at the time of its passage."

Appendix E.

The New York Railroad Law (Ch. 565, Laws of 1890) §95, as amended by Ch. 676, Laws of 1892:

§ 95. *Percentage of gross receipts to be paid in cities or villages; reports of officers.* Every corporation building or operating a railroad or branch or extension thereof, under the provisions of this article, or of chapter 252 of the laws of 1884, within any city of the state having a population of 1,200,000 or more, shall, for and during the first five years after the commencement of the operation of any portion of its railroad annually, on November first, pay into the treasury of the city in which its road is located, to the credit of the sinking fund thereof, three per cent. of its gross receipts for and during the year ending September thirtieth next preceding; and after the expiration of such five years, make a like annual payment into the treasury of the city to the credit of the same fund, of five per cent. of its gross receipts. If a street surface railroad corporation existing and operating any such railroad in any city on May 6, 1884, shall have thereafter extended its tracks or constructed branches therefrom, and shall operate such branches or extensions under the provisions of chapter 252 of the laws of 1884, or of this article, such corporation shall pay such percentages only upon such portion of its gross receipts as the length of such extension or branches shall bear to the entire length of its line. In any other incorporated city or village the local authorities shall have the right to require, as a condition to their consent to the construction, operation or extension of railroad under the provisions of this

article, the payment annually of such percentage of gross receipts, not exceeding three per cent, into the treasury of the city or village as they may deem proper. In case of extension the amount to be paid shall be ascertained in the manner heretofore provided. The corporation failing to pay such percentage of its gross earnings shall, after November first, pay in addition thereto five per cent a month on such percentage until paid. The president and treasurer of any corporation required by the provisions of this article to make a payment annually upon its gross receipts shall, on or before November first in each year make a verified report to the comptroller or chief fiscal officer of the city of the gross amount of its receipts for the year ending September thirtieth, next preceding, and the books of such corporation shall be open to inspection and examination by such comptroller or officer, or his duly appointed agent, for the purpose of ascertaining the correctness of its report as to its gross receipts. The corporate rights, privileges and franchises acquired under this article or such chapter by any corporation, which shall fail to comply with all the provisions of this section, shall be forfeited to the people of the state, and upon judgment of forfeiture rendered in an action brought in the name of the people by the attorney general, shall cease and determine.